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ASSAULT—POINTING AN UNLOADED GUN.—Although assaults are of common occurrence, it is doubtful whether any other offence known to the law has been more fruitful of definitions. The one generally accepted is that of Hawkins, "An attempt or offer, with force and violence, to do a corporeal hurt to another." 1 Hawkins, P. C. 110. According to another, which is often cited, it is any act accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another. 1 East, P. C. 406; Russell, Cr., 9th ed. 1019. Bishop defines it as an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being. 2 Bishop, Cr. Law, Sec. 23. Wharton's definition is in terms similar. The attempt need be only apparent. 1 Wharton, Sec. 603. This modifies considerably the definition of Hawkins. It leaves out of the question the ability or the inability to commit a battery and makes the offence depend

on the outward demonstration, and its effect upon the person against whom it is directed. According to this view if A points at B an unloaded gun, which B believes to be loaded and is thereby put in fear, A is guilty of an assault.

From these few of the many definitions of assault it will be seen that so far as the text-writers are concerned the question may be answered either way according to the selection made. The same is true of the cases.

The English authorities are not uniform. In 1840, during a trial at *nisi prius* before Baron Parke, a case was cited in which Mr. Justice Erskine laid down the law that pointing a pistol at another would not amount to an assault unless the pistol were loaded. 9 C. and P. 492. Baron Parke, however, thought otherwise. "My idea is," he said, "that it is an assault to present a pistol at all, whether it is loaded or not. If you threw the powder out of the pan or took the percussion cap off and said to the party, 'This is an empty pistol,' that would be no assault, for there the party must see that it was not possible for him to be injured, but if a person presents a pistol which has the appearance of being loaded and puts the party into fear and alarm, that is what it is the object of the law to prevent." *R.* v. *St. George*, 9 C. and P. 491. The remark of the learned Baron, however, is but *dictum*. The jury found that the pistol was loaded and that the prisoner presented it with intent to discharge it. In 1843 a doubt was expressed upon the question by Baron Rolfe. *R.* v. *Baker*, 47 Eng. C. L. R. 253. The following year Tindal held that it is an assault only when the pistol is loaded. *R.* v. *James*, 1 C. and K. 530.

In this country the question seems to be as much a matter of geography as of principle. In the South and West the prevailing view accords with the recent decision of the Supreme Court of California in *People* v. *Sylva*, 76 Pac. 814 (1904), that pointing an unloaded gun at another, accompanied by a threat to discharge it, does not constitute an assault. In other words, there can be no assault without a present intention and a present ability. The leading case in support of this view is *Chapman* v. *State*, 78 Ala. 463 (1884). It proceeds upon the theory that an act does not become a criminal assault because it puts another in fear or tends to cause a breach of the peace. The view to the contrary is well stated by Wells in *Com.* v. *White*, 110 Mass. 407 (1882): "It is not the secret intention of the assaulting party nor the undisclosed fact of his ability or inability to commit the battery that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action, and the same rule applies to the proof necessary to sustain a criminal complaint

for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace." It will be noticed that this accords with the definitions of Bishop and of Wharton. It seems to ignore the question of criminal intent, and makes the putting in fear, and the tendency to cause a breach of the peace, the gist of the offence. This view will be examined at some length.

The tendency of the act to cause a breach of the peace cannot be the true test, for abusive language will do that. In fact, it has a greater tendency, for in the case of an unloaded gun there is often a restraining influence which words do not have. Yet it is well settled that no words, however opprobrious, can amount to an assault. 1 Hawkins, P. C. 110.

That the fear in which the person is put, at whom the gun is pointed, is ground for a civil action is admitted by those who deny that the act amounts to a criminal assault. *Chapman* v. *State, supra.* This raises the question whether there is any difference between the criminal and the tort assault. That a person may be subjected to both actions for the same offence is well recognized. An eminent American judge once said that a party is always answerable to the public by indictment when he is to the private person by action: Ruffin, C. J., in *State* v. *Gibson,* 10 Ired. 215. The statement, however, is too sweeping. It is generally admitted that the difference lies in the intent. 2 Bishop, Cr. Law, Sec. 60 (2). The tort assault does not require the same degree of mental mischief which is necessary to support the indictment. It rests upon the infringement of the right which every one has "to live in society without being put in fear of personal harm." *Beach* v. *Hancock, 27* N. H. *223*; Pollock, Torts, *247*; Cooley, Torts, 161. In the early law the distinction was more marked. The action of trespass *vi et armis* lay for a breach of absolute rights. According to this conception the defendant acted at his peril. If he invaded the sanctity of the plaintiff's person he was liable although the act was done without design or intention. It naturally followed that if the plaintiff was not aware of the harm which threatened him he had no action of tort no matter how evil may have been the intentions of the defendant. The object of the civil action is to compensate the injured party, and in order to ascertain what rights of his have been violated the law looks primarily to him and not to the wrongdoer. But in the criminal assault it is otherwise. The state, whether its object be to punish or to reform, is concerned with the wrongdoer. If it finds that the act was done with the necessary intent, then the crime has been committed no matter how the act may have affected the other party. Hence it follows that one may be guilty of the criminal assault although the party upon whom

it was attempted was wholly ignorant of the fact and, therefore, free from alarm. *People* v. *Lilley,* 43 Mich. 525. Much of the conflict on this subject is doubtless due to a failure on the part of the courts to observe the distinction between these two actions.

That the test cannot be the alarm which the act occasions is further shown by the cases where the offer of violence is conditional. Thus an indictment for assault was sustained where the defendant doubled up his fist at another and said, "If you say so again, I will knock you down." *U. S.* v. *Myers,* 1 Cranch, C. C. 310. In such cases it can hardly be said that the party is put in fear. He can avoid the threatened attack by complying with the condition, and yet all the authorities are agreed that such an act constitutes an assault because it shows that the defendant intends to apply the unlawful force unless the other obeys the command and forbears to do something which he has a right to do.

The act moreover is not necessarily an assault because it gives the party at whom the gun is pointed a legal excuse for what he may do in self-defence. In the civil or the criminal proceeding his justification would be, not that the act was an assault, but rather that the other party having represented it to be such he cannot avoid the natural consequences to which his conduct led by showing that the facts were not what he had held them out to be. Russell, Cr. 1019.

But the strongest objection to the view as expressed above is that it ignores the question of criminal intent. While many of the definitions of assault say nothing of the intent, it cannot be unnecessary. It is fundamental to the criminal law that there can be no crime unless there is a union or joint operation of act and intention or criminal negligence. Intent alone, no matter how evil, is not enough. Until it expresses itself in conduct no offence has been committed of which the law takes cognizance. Both these elements are essential, and the absence of either is fatal to the indictment. That the intent is necessary in assault is shown by an old case so often cited that any treatment of this subject seems incomplete without it. The evidence to prove a provocation was that the plaintiff put his hand upon his sword and said, "If it were not assize time, I would not take such language from you." The court agreed that this was not an assault, "for the declaration of the plaintiff was that he would not assault him, the judges being in town; and intention as well as the act makes an assault." The court was also of the opinion that "if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault." *Tuberville* v. *Savage,* 1 Modern,

3. To the same effect is a Pennsylvania case before Chief-Justice Tilghman almost one hundred and fifty years later. The defendant raised his hand against another within striking distance and said, "If it were not for your gray hairs, I would tear your heart out." This was held to be no assault because the words explain the action and take away the idea of the intention to strike. *Com.* v. *Eyre*, 1 Serg. and R. 347 (1815). Bishop cites these cases with approval. This writer is again referred to, for he has done more than any other to graft into the definition of assault the idea that the intent need be only apparent. If we keep in mind that in the criminal assault the state is concerned primarily with the wrongdoer, then, in the case where one presents an unloaded gun at another, knowing it is not loaded, this last fact as clearly takes away the idea of an intention to shoot as the means employed in the cases just cited negatived the idea of an intention to strike. One who knows the gun is unloaded cannot possibly intend to shoot the person at whom it is pointed. But suppose the party pointing the gun believes it is loaded when in fact it is not? In *Com.* v. *Sears*, 86 Mo. 169, a case which holds that it is not an assault to point an unloaded gun at another, it was said: "An intention on the part of the accused to do the other some bodily harm is essential to constitute an assault. It may be that if one point a gun at another, supposing it to be loaded, with the intent to shoot him, it would be a criminal assault; but knowing that the gun had no charge in it he could not possibly have intended to injure another by shooting. It is difficult to conceive one guilty of a crime which he did not intend." This *dictum* makes a "present ability" unnecessary. That term is somewhat indefinite and may be given a meaning more extensive than the courts which have used it intended. Thus it might be said that if a man intends to shoot another, but before he can pull the trigger a third person strikes the gun aside, or the cartridge fails to go off, he is not guilty of an assault because he did not have the "present ability." But such an act would no doubt be an assault in any jurisdiction which requires a "present ability." The term is synonymous rather with having done all that a reasonable man would do in preparation for the attempt. Such a one would select adequate means, a loaded gun, and if he had done so, he would have a "present ability" and would be guilty of an assault although prevented by some extraneous circumstance over which he had no control. See *People* v. *Le Kong*, 95 Cal. 666.

Just what the intent in assault should be is not clear. Since the offence is generally defined as an attempt to do a corporeal hurt to another, the intent, it would seem, which the law requires would be the intent to attempt rather than to commit a battery. According to the cases, however, it is the latter. They

generally state that the intention to do some bodily harm is necessary. This practically makes no difference, so far as the intent is concerned, between assault and battery, and has doubtless contributed towards the present use of the word assault as including a battery. In fact, it has been said by an eminent authority that there is no reason for maintaining the distinction of terms in our modern practice. Pollock, Torts, 249.

To sum up this subject, it may be said that in all jurisdictions there must be an apparent present intention and ability to commit a battery. Some hold this is enough; others require more. All the cases agree that if the intent and the ability be actual, it is an assault. Between the two is a conflict which cannot be reconciled. In some states statutes defining and punishing assaults have set the question at rest by expressly declaring that an apparent ability will not do. There must be a present intent coupled with a present ability. *Pratt* v. *State,* 49 Ark. 179; *Klein* v. *State,* 9 Ind. App. 305. If it does not appear whether the gun was loaded or not, the fact that it was not becomes a matter of excuse and must be proved by the defendant. *Crowe* v. *State,* 41 Tex. 468; *State* v. *Cherry,* 11 Ired. 475. Contra: *State* v. *Napper,* 6 Nev. 113.

That pointing an unloaded gun at another deserves punishment will be readily admitted. Any conduct which is intended to put another in fear of bodily harm is highly reprehensible, and has been held to be a misdemeanor. *State* v. *Benedict,* 11 Vt. 239. But that fact alone does not make it an assault. Pointing an unloaded gun is neither an act nor the commencement of an act which can possibly result in a battery. The fact that the gun is unloaded rebuts the intent, and if that is wanting the offence is not made out. The following cases are in accord: *S.* v. *Davis,* 1 Ired. 125 (1840); *Vaughan* v. *S.,* 11 Miss. 553 (1844); *Henry* v. *S.,* 18 Ohio, 32 (1849); *Robbinson* v. *S.,* 31 Tex. 170 (1868); *S.* v. *Napper,* 6 Nev. 113 (1870); *P.* v. *Lilley,* 43 Mich. 525 (1880); *Crow* v. *S.,* 41 Tex. 468 (1874); *McKay* v. *S.,* 44 Tex. 43 (1875); *S.* v. *Sears,* 86 Mo. 169 (1885); *Pratt* v. *S.,* 49 Ark. 179 (1887); *McConnel* v. *S.,* 25 Tex. App. 329 (1888); *Chapman* v. *S.,* 78 Ala. 463 (1884); *S.* v. *Godfrey,* 17 Ore. 300 (1889); *P.* v. *Le Kong,* 95 Cal. 666 (1892); *Klein* v. *S.,* 9 Ind. App. 365 (1893); *P.* v. *Sylva,* 76 Pac. 814 (1904).

These cases are contra: *S.* v. *Smith, 2* Humph. (Tenn.) 457 (1842); *S.* v. *Shepard,* 10 Ia. 127 (1859); *Com.* v. *White,* 110 Mass. 407 (1872); *P.* v. *Moorehouse,* 6 N. Y. Supp. 763 (1889; *S.* v. *Archer,* 54 Pac. 927 (Kan.), 1898.

EBY.